Supreme Court, U.S.
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In The

Supreme Court of the United States

ILLINOIS DUNESLAND PRESERVATION SOCIETY,
an Illinois not-for-profit corporation,
Petitioner,

v.

ILLINOIS DEPARTMENT OF NATURAL RESOURCES,
an agency of the State of Illinois, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

DONALD L.F. METZGER
Counsel of Record
39 SOUTH LASALLE STREET
SUITE 200
CHICAGO, ILLINOIS 60603
(312) 782-7728
dlf.metzger@gmail.com

Attorney for Petitioner

February 8, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800 890 5001

QUESTIONS PRESENTED

1. Whether the refusal of the Seventh Circuit Court of Appeals to apply the forum analysis doctrine to determine the right of access of the petitioner to pamphlet racks in a state park in which the literature of private speakers was displayed if of interest or concern to park visitors was erroneous and in conflict with the decisions of the Supreme Court, such as *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985), and *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983).

2. Whether the refusal of the Seventh Circuit Court of Appeals to distinguish among instrumentalities of expression where government management is involved erroneously makes expressive activity conducted on public property government speech in conflict with the decisions of the Supreme Court, such as *Pleasant Grove City v. Summum*, 129 S.Ct. 1125 (2009).

LIST OF PARTIES

The appellant in the proceeding in the Seventh Circuit was Illinois Dunesland Preservation Society, an Illinois not-for-profit corporation. The appellees in the proceeding were Jonathan Furr, Stan Yonkauski, Tim Hickmann, Beverly Ascaridis, Tony Mayville, and Joe Bauer, agents of the Illinois Department of Natural Resources, and Tom Schafer and Jennifer Davis, agents of the Illinois Department of Public Health, in both their official capacity and in their personal capacity.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner, Illinois Dunesland Preservation Society, is an Illinois not-for-profit corporation. It issues no stock. It has no parent corporation. No publicly held company has any ownership interest in the Dunesland Society.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 584 F.3d 719 (7th Cir. 2009), and is reproduced in the appendix. The order of the Seventh Circuit denying the petition for rehearing and rehearing *en banc* is also reported there, and is reproduced in the appendix. The memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 587 F.Supp.2d 1012 (N.D. Ill. 2008), and is reproduced in the appendix.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the Seventh Circuit was entered on October 14, 2009. The timely petition of the Dunesland Society for rehearing and rehearing *en banc* was denied on November 10, 2009. This Court has jurisdiction to review on a writ of certiorari the judgment of the Seventh Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law...abridging the freedom of speech....

United States Constitution, Amendment XIV:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Asbestos At The Park

In the late 1990s, asbestos appeared at the beach at Illinois Beach State Park (IBSP). In February, 2000, the office of the Illinois Attorney General informed the Illinois Department of Natural Resources (IDNR), the Illinois Department of Public Health (IDPH), and the Illinois Environmental Protection Agency (IEPA) that an investigation to determine the source and responsible parties for the asbestos containing material (ACM) found at IBSP indicated that there were five responsible parties, including IDNR and Johns-Manville Corporation.

In March, 2000, IDPH, in cooperation with the federal Agency for Toxic Substances and Diseases Registry (ATSDR), released a written public health assessment regarding asbestos contamination at the Park. The assessment provided that IDPH, IDNR, and IEPA jointly develop a fact sheet to communicate information regarding asbestos containing material at IBSP, to be available in literature racks and kiosks in heavily used areas of the Park.

Pursuant to the assessment, a multi-fold information sheet was produced and was supplied to the Park. In the early 2000s, IDNR provided a separate plexiglass display and the tri-fold asbestos brochure. The brochure went out of print, supply ran

out, and Bob Grosso (Grosso), superintendent of the Park, photocopied it for a time, but had stopped copying it by 2004. Grosso told the Dunesland Society that the printing costs for the asbestos brochure were not allocated in the budgets; that Grosso was told that there was not money to display and have reprints; that the brochure itself did not keep up with the times and didn't truthfully depict the exposure that the public would have at the beach, which by then included microscopic asbestos; and that there was no brochure in the racks. IDNR had no policy with respect to the asbestos contamination at the Park, or the adjacent Manville superfund site and possible contamination of the Park from there, and no policy relating to signage at the Park concerning asbestos.

The Dunesland Pamphlet Request

On August 31, 2004, Dunesland made a written request to Grosso that IDNR display "public service flyers relating to asbestos and protecting the health and safety of the public" at the Park, "in the same areas where other informational and cautionary flyers and brochures are displayed", including the office, the interpretive center, and the lodge. The beaches contain amphibole asbestos, hundreds of times more toxic than chrysotile, which is also there, and tremolite. The informational purpose of the flyer was to make sure people understood what they could be exposed to; it was cautionary and gave tips to the public. Information about asbestos contamination at the Park or the health risks of asbestos was absolutely of interest to visitors to the Park.

Grosso sent Dunesland a letter dated September 1, 2004, which stated: "I have been instructed by IDNR

Springfield management to relay the following reply to the Illinois Dunesland Preservation Society regarding your flyer request of 8-31-04. The IDNR does not feel the flyer initiated by the Illinois Dunesland Preservation Society contains appropriate content. Your request to supply the visiting public with the Dunesland initiated flyer utilizing Park outlets is denied. Thank you for your continued interest in Illinois Beach State Park."

Literature Display Practice At The Park

The Park office had 36 plexiglass holders on one wall for displaying and distributing literature, and there was also a counter where literature was distributed. In addition, there were counters or holders for displaying and distributing literature in other areas of the Park.

IDNR management did not make any designation of specific purposes for use of the pamphlet areas at IBSP, authorize the use of the pamphlet areas for certain purposes, communicate to Grosso or Julie Brewer, the office coordinator, any statement of a purpose for the pamphlet racks or for displaying literature, or provide any rules, instructions, policies, guidelines, limitations, or restrictions for what literature could be displayed at the Park.

The pamphlet racks were not limited to IDNR-generated materials. IDNR did not instruct the Park staff to use IDNR literature at the Park, and did not designate or provide any literature for display other than a Park brochure and IDNR magazine. Material from the public could be and was displayed at the Park, depending on what it was.

It was the practice for the site superintendent to make the decision as to which pamphlets he or she would allow to be displayed at the Park. If a brochure was dropped off with the clerical staff, who were asked to post it, the staff could take it and post it on the pamphlet rack as long as an official employee of the department, such as the site superintendent, could make the call, using discretion and common sense.

Requests by the public to display pamphlets and other literature were handled by the site staff. Grosso and Julie had discretion to approve or disapprove of pamphlets and to acquire pamphlets, and did not have to request advice or decision from Springfield. Grosso had the ultimate decision, but he and Julie worked together.

Julie maintained the pamphlet areas. She displayed literature that she thought would be of interest or concern to Park visitors: information about the Park, the area, health matters, and special events. She also took it upon herself to get pamphlets, but did not solicit pamphlets from the general public; she called various places and got brochures, including the Lake County convention bureau and visitors center. The Zion chamber of commerce brought information to the Park and asked that it be displayed, and it was, and the Lake County health department sent information and pamphlets. There was no other selection, review, or approval process. Entities which provided pamphlets displayed at the Park were not required to obtain any type of permit.

Some of the literature displayed included local restaurants, Long Grove historic and tourist destinations, Wauconda Orchards, and Zion special

events. The content of the pamphlet racks and Park office counter was fluid, there could be more or less from time to time, with seasonal changes as well. On September 1, 2004, Grosso listed the following pamphlets that were displayed at that time: Bass Pro Shop, Chain-o-Lakes, Chicago Visitor transit map, E-Coli, Emerald Ash Borer, Fire, Great Lakes Naval Museum, Gurnee Mills shopping center, Horizons Newsletter Lake County Forest Preserve, IBSP brochure, IBSP site packet, Illinois State Park Magazine, Lake County Recreation Guide, Lake County Visitor Map Guide, Lake Michigan statistics, Lambs Farm, Metra train schedule, Places for Pets, Resort brochure, Six Flags Great America amusement park, State of Illinois road map, West Nile Virus, WGTD Bike Trail Guide.

IDNR allowed Dunesland to display informational brochures and handouts. Grosso and Julie thought that Dunesland literature was of interest to Park visitors, and displayed for years newsletters and membership applications which Dunesland provided. They also displayed the Dunesland flower book.

The Asbestos Issue

In August, 2004, asbestos contamination at the Park was a hot issue, with articles in the papers about it and sweeps at the Park. IDNR people said that asbestos wasn't a problem, or minimized it, while those at the Park saw asbestos and heard about microscopic asbestos, and were concerned. The IDNR people wanted Grosso to call them about asbestos matters, they wanted to know if newspapers called and wanted to talk about the asbestos at the beach. Julie felt that IDNR thought it wasn't a big issue, but she felt there

was an issue, and that Grosso wanted to protect the public and was concerned about the public's health.

On August 31, the day he received the Dunesland request and pamphlet, defendant Furr, the IDNR general counsel, discussed with consultants the issuance of a news release to come from IDNR, IDPH, and the attorney general's office, to provide information to the public because of the asbestos issues at the Park. The next morning, Furr notified defendants Ascaridis, Mayville, Hickmann, and others about the press release plan. IDPH was asked to review the pamphlet and provide comments on the content in a critique. Grosso was instructed to deny the Dunesland request because of its content, and was told that defendant Bauer would send him the press release.

The next day, after receiving the IDPH critique, Furr circulated a draft "status report/public communication piece" to IDPH, IEPA, Bauer, and the attorney general's office, to be issued as soon as possible. Hickmann responded that he thought it was critical "that this gets out today".

A few days later, Furr contacted IDPH, IEPA, and others by e-mail, with copies to Ascaridis, Hickmann, defendant Yonkauski, and Moomey and Runkle at IDPH, and told them that, when Dunesland asked for approval to distribute a brochure, "we discovered that the previously approved brochure had not been displayed at the site for quite some time." Furr stated: "Obviously, this is a situation we want to correct as quickly as possible. To that end, attached is a draft brochure that updates the information in the prior brochure. I would see this brochure serving as a

temporary fix until after we receive the task force report, when we can update our public informational materials." IDPH opposed the idea until additional information was available.

In June, 2005, a new site superintendent at the Park sent Kelly, the acting regional land manager, a copy of the Dunesland June newsletter delivered to the Park for display. Kelly believed the newsletter contained much of the asbestos pamphlet that had been excluded, and denied the request to display the newsletter.

Basis For Federal Jurisdiction

The jurisdiction of the United States District Court for the Northern District of Illinois was invoked by Dunesland on May 23, 2006, pursuant to 28 U.S.C. § 1331 for civil actions arising under the Constitution of the United States, as to claims for declaratory and injunctive relief under the First and Fourteenth Amendments; pursuant to 28 U.S.C. §2201(a) as to the claim for declaratory judgment, in that the claims of plaintiff involved an actual controversy regarding the rights and obligations of the parties; and pursuant to 28 U.S.C. §1331 for civil actions arising under the laws of the United States, as to claims for damages under 42 U.S.C. §1983 for the deprivation of constitutional rights secured by the First and Fourteenth Amendments.

REASONS FOR ALLOWANCE OF THE WRIT

The Seventh Circuit decision of October 14, 2009, conflicts with the decisions of the United States Supreme Court in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985), and *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983), regarding the application of the doctrine of forum analysis; with *Pleasant Grove City v. Summum*, 129 S.Ct. 1125 (2009), regarding the determination of government speech; and with the decision of the Seventh Circuit Court of Appeals in *Choose Life Illinois, Inc. v. White*, 547 F.3d 853 (7th Cir. 2008), regarding the application of forum analysis and the determination of government speech. Review by the Supreme Court is therefore necessary to resolve those conflicts and to secure and maintain uniformity of the decisions of those courts.

I. THE DECISION OF THE SEVENTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT REGARDING THE FORUM ANALYSIS DOCTRINE

The Seventh Circuit opinion is dismissive (at 7a) of the forum analysis doctrine articulated by the Supreme Court in *Perry* and *Cornelius* and other decisions, such as *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), and consistently applied by this Court: "Indeed it is rather difficult to see what work 'forum analysis' in general does." Although the court of appeals finds (at 7a-8a) that "every public site of private expression has to be regulated to some extent", that "the character of permitted regulation

will vary with differences among the different types of site", and that "[t]he constant...is that regulation is not to be used as a weapon to stifle speech", it sees no "relevant difference" between recognized speech forums and other instrumentalities of expression where "the management of a government facility has to decide which...work will be allowed to be exhibited, in view of the site's limited capacity."

Yet, the recent Seventh Circuit opinion in *Choose Life Illinois v. White*, 547 F.3d 853 (7th Cir. 2008), follows the analytical approach required by the Supreme Court, in the context of specialty license plates issued by the State of Illinois. The State argued there that the messages on specialty license plates were the government's own speech, not private or a mixture, and therefore no First Amendment rights were implicated. The court rejected that view, and held that specialty license plates "implicate the speech rights of private speakers, not the government-speech doctrine. This triggers First Amendment 'forum' analysis, and we conclude specialty plates are a nonpublic forum. Illinois may not discriminate on the basis of viewpoint, but it may control access to the forum based on the content of a proposed message – provided that any content-based restrictions are reasonable." 547 F.3d at 855. The court explained:

> "Messages on specialty license plates cannot be characterized as the government's speech. Like many states, Illinois invites private civic and charitable organizations to place their messages on specialty license plates....Editorial control over the message is shared between the sponsoring organization and the State; the organization typically develops the plate design,

> subject to the State's authority to modify it. The most obvious speakers in the specialty-plate context are the individual vehicle owners who choose to display the specialty plates and the sponsoring organizations whose logos or messages are depicted on the plates. The State can reasonably be viewed as having approved the message; it is commonly understood that specialty license plates require State authorization.....[T]here are enough elements of private speech here to rule out the government-speech doctrine....Because private-speech rights are implicated, we proceed to First Amendment forum analysis." 547 F.3d at 863-64.

Here, where the facts indicate that a speech forum has been opened in the pamphlet racks and private speech is allowed if of interest or concern to Park visitors, the Dunesland message, like the messages of other private speakers in the pamphlet racks, originates with the speaker; the government exercises no editorial control over the messages; and the private party communicates the message. This should have triggered forum analysis.

A. The Court Of Appeals Misapprehends The Forum Analysis Implications Of The Literature Display Practices At The Park

The Seventh Circuit describes (at 3a) the display of literature in the Park's pamphlet racks: (1) "The park's numerous display racks contain a variety of brochures and flyers selected by park officials."; (2) "Some of these are produced by the park itself and are guides to the park or lists of nearby resorts."; (3) "Some are maps; some, government warning about pathogens.";

and (4) "There are also brochures advertising such draws in the area as...sights that might interest tourists." In fact, the brochures and flyers displayed are not "selected" by park officials, as described above; there are two IDNR-generated pamphlets; there are two health and safety brochures (*e. coli* and West Nile virus); and there are numerous pamphlets from the public relating to matters that the site staff thought would be of interest or concern to Park visitors.

IDNR management testified that information about asbestos contamination at the Park or the health risks of asbestos was absolutely of interest to visitors to the Park. IDNR management scrambled to bar the Dunesland pamphlet and put out a press release countering what they perceived as the Dunesland message, and decided to attempt to develop a new brochure.

The opinion states (at 9a): "The materials chosen for the display racks...are designed to attract people to the park..." That is plainly inconsistent with the earlier acknowledgment that "some" brochures in the racks are "warnings about pathogens". Health and safety brochures, which warn about *e. coli* and West Nile virus, are not different from a flier warning about inhaling microscopic asbestos. Further, the materials in the racks are not "chosen", they are allowed. Attracting people to the Park was not the criterion used by the site staff in displaying pamphlets. They allowed pamphlets that they thought would be of interest or concern to Park visitors. Indeed, the materials on the racks cannot "attract people to the park". The materials are there for visitors, people who are already at the Park.

The pamphlet areas are simply a government sponsored forum in which private citizens speak. Control of access and exercise of discretion are forum attributes. Control over access is common to both a nonpublic (selective access for individual speakers in a class) and designated public (general access for a class of speakers) forum. If the pamphlet racks were not a forum, there would be no access to control. Access by private speakers makes property a speech forum, and control over access is inherent therein. *Cornelius*, at 799-800 ("the extent to which the government can control access depends on the nature of the relevant forum"). Control over access simply recognizes that a forum has limits. "Control over access to a nonpublic forum" must be reasonable in light of the purpose served by the forum and viewpoint neutral. *Cornelius*, at 806.

Similarly, the exercise of discretion is an aspect of the maintenance of a forum. IDNR staff simply exercised a regulatory/administrative discretion to allow general access for a class of speakers, or selective access for individual speakers for whom eligibility for access was reserved. The "common sense and discretion" which the trial court found the IDNR staff employed to display pamphlets was simply the discretion that the government employs in reserving the forum for its intended purposes (designated public forum), or exercising control over individual access in light of the purpose served by the forum (nonpublic forum). The discretion exercised by the Park superintendent, who wanted to display the Dunesland pamphlet but was instructed to deny it by IDNR management, and his assistant, was a regulatory, not a communicative, discretion.

B. The Court Of Appeals Avoids Forum Analysis By Using Inaccurate Information Outside The Record Regarding The Risks Of Park Asbestos Contamination

The plain message of the Dunesland safety pamphlet is: there is microscopic as well as chunk asbestos contamination at the Park, so you should follow these government-recommended tips to minimize your exposure to asbestos. The Seventh Circuit opinion, however, disparagingly describes and characterizes the pamphlet, not simply to contrast it with the "anodyne" asbestos "fact sheet" that the State had at one time displayed at the Park, but to challenge the accuracy of the pamphlet, although that issue was removed from the case by the trial court's discovery ruling and application of the doctrine of judicial estoppel, thereby also barring the demonstration by Dunesland that certain studies are not scientifically valid or accurate.

The disparaging characterization of the Dunesland safety pamphlet is both irrelevant to the issues in the case and inaccurate in the context of the asbestos contamination in the Park. The panel opinion makes the following hyperbolic and sarcastic descriptions of the Dunesland pamphlet: (1) "The defendants refused to display in the display racks in various buildings in the park a scary two-page pamphlet that the plaintiff had prepared." (at 2a); "It ['a "fact sheet", which is in the record, about asbestos in the park that had been prepared by state environmental and health agencies' [(4a-5a)] is as anodyne as the plaintiff's pamphlet is alarming." (at 5a); (3) "the plaintiff sought access to the racks for its frightening pamphlet" (at 9a); (4) "Most people who read and believed the plaintiff's

pamphlet would flee the park forthwith." (at 9a); (5) "the current fact sheet...must be less alarmist than the plaintiff's, or the park officials wouldn't have excluded the plaintiff's" (at 9a); (6) "The message of the plaintiff's pamphlet is: you think you're in a nice park but really you're in Chernobyl, so if you're dumb enough to come here be sure not to step on the sand because that would disturb or agitate it, and to scrub under your fingernails as soon as you get home." (at 9a-10a); and (7) "angry pamphlets by environmental activists" (at 10a). The pamphlet is reproduced in the appendix.

The opinion holds (at 3a): "Studies of the beaches by federal and state agencies have not found levels of asbestos sufficient to menace human health." The opinion references (at 4a) websites "visited on September 21, 2009". This material is not evidence in the case, and the panel's conclusion is not correct. The U.S. Surgeon General, the office of the Illinois Attorney General, and the USEPA have all acknowledged that there is no safe level of asbestos exposure. The office of the surgeon general, in the U.S. Department of Health and Human Services, states:

> [T]here is no level of asbestos exposure that is know to be safe and minimizing your exposure will minimize your risk of developing asbestos-related disease....Asbestos can be dangerous if it is inhaled. Activity that disturbs asbestos causing these small fibers to float in air increases the chances of inhalation and the concentration of asbestos-related diseases. Disturbance is what leads to exposure.

Dunesland supplied websites of various government sources in support of this proposition in its petition for rehearing before the court of appeals.

II. THE DECISION OF THE SEVENTH CIRCUIT CONFLICTS WITH DECISIONS REGARDING GOVERNMENT SPEECH

The Seventh Circuit's construct, that there is no "relevant difference" between recognized speech forums and other instrumentalities of expression where government "management" is involved, allows the court to reason (at 9a-10a) – applying its reading of *Pleasant Grove City v. Summum*, 129 S.Ct. 1125 (2009), to its erroneous view of the facts here – that the literature display racks at the Park are government speech. This paradigmatic shift in the application of the First Amendment means that what were channels of private speech, though regulated and limited by appropriate restrictions, have become instrumentalities of government speech, limited to government expressive activity and government messages. *Summum* does not countenance such a shift.

There, the Supreme Court held that by allowing the placement of donated permanent monuments in a public park, the city was exercising a form of government speech not subject to scrutiny under the First Amendment. The disagreement centered on the nature of the city's conduct and whether it was engaging in its own expressive conduct, or providing a forum for private speech. "If petitioners were engaging in their own expressive conduct, then the Free Speech Clause has no application....While government speech is not restricted by the Free Speech Clause, the

government does not have a free hand to regulate private speech on government property." 129 S.Ct. at 1131, 1132. The Court found that "[p]ermanent monuments displayed on public property typically represent government speech." *Id.*; "The monuments that are accepted...are meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id.* at 1134. The Court explained that the monuments in the city's park represented government speech:

> "[T]he City decided to accept those donations and to display them in the Park. Respondent does not claim that the City ever opened up the Park for the placement of whatever permanent monuments might be offered by private donors. Rather, the City has "effectively controlled" the messages sent by the monuments in the Park by exercising "final approval authority" over their selection....The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park. It has taken ownership of most of the monuments in the Park,...and the City has now expressly set forth the criteria it will use in making future selections." 129 S.Ct. at 1134.

Here, the court of appeals constructs a government message in the pamphlet racks where one does not exist: "The choice of materials conveys a message that is contradicted by the plaintiff's pamphlet." (at 9a); "The message of the publications in the display racks is: come to the park and have a great time on the sandy beaches." (at 9a). The IDNR staff displayed literature that they thought would be of interest or

concern to Park visitors: information about the Park, the area, health matters, and special events. There is no evidence in the record of intent on the part of the State to convey any message through the pamphlet racks (other than in its two brochures placed therein). "Examining the government's intent to determine whether a forum has been designated for expressive activity requires a factual inquiry into the policy and practice of the government." *Air Line Pilots Association v. Department of Aviation*, 45 F.3d 1144, 1155 (7th Cir. 1995). This inquiry "guards against the dangers of post-hoc policy formulation". *Id.* at 1153. "The government may not 'create' a policy to implement its newly-discovered desire to suppress a particular message." *Id.*

The government opened a nonpublic or designated public forum in the pamphlet racks, which are not an instrumentality of government speech. The conduct of IDNR is not consistent with an intent to use the pamphlet racks as a facility for its expressive activity. If it had so intended, it would not have barred the Dunesland pamphlet on the basis that it does not contain appropriate content. It would have stated that the racks were a channel in which it speaks for itself and expresses the views that it wants to express. It would not have procured a critique of the pamphlet from IDPH, or searched state law for legal grounds to exclude the pamphlet. It would have stated that it controls the messages expressed. It would have asserted that the display racks were government speech.

The panel opinion discusses (at 10a-11a) "the compelling practical objections to the plaintiff's position." But these "objections" are no more than the

practical difficulties of regulating and administering a speech forum. They can be managed, and resolved, with appropriate criteria, guidelines, policies, limitations, and practices. Or they can be avoided by not opening the facility to private speech. The one solution that cannot be employed is the one that the Seventh Circuit has chosen: to call channels of limited private speech instrumentalities of government speech. The panel says (at 11a) the effect of the position urged by Dunesland would be "no more display racks on public property; no more home pages for public agencies....We can avoid that end by avoiding this beginning." Really, the effect would be no more unregulated racks and more well-constructed home pages. This could be the beginning of responsible management. But if forums for limited private speech are redefined as government speech, as the court of appeals holds, the end result would not be no racks, it would be no private speech.

CONCLUSION

The Seventh Circuit decision has prescribed a paradigmatic shift in the application of the First Amendment to questions of private speech in public facilities. The decision conflicts with decisions of the U.S. Supreme Court concerning the meaning, scope, and application of the forum analysis doctrine, and concerning the determination of government speech. The decision also conflicts with decisions of the Seventh Circuit in those areas. The Supreme Court should grant this petition for a writ of certiorari and reverse the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

Donald L.F. Metzger
39 South LaSalle Street
Suite 200
Chicago, Illinois 60603
(312) 782-7728
dlf.metzger@gmail.com

Attorney for Petitioner

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 09-1535

[Filed October 14, 2009]

ILLINOIS DUNESLAND PRESERVATION SOCIETY,	)
Plaintiff-Appellant,	)
v.	)
ILLINOIS DEPARTMENT OF NATURAL RESOURCES, *et al.*,	)
Defendants-Appellees.	)

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 06 C 2880—**Elaine E. Bucklo**, *Judge*.

ARGUED SEPTEMBER 11, 2009—
DECIDED OCTOBER 14, 2009

Before EASTERBROOK, *Chief Judge*, and POSNER and WOOD, *Circuit Judges*.

POSNER, *Circuit Judge*. Illinois Beach State Park is a large state park abutting Lake Michigan in northeastern Illinois; it attracts upward of two million visitors in some years. The plaintiff, a nonprofit corporation that helped to create and continues to support the park, filed this suit under 42 U.S.C. § 1983 against state officials involved in its management and the state agency that operates the park, charging infringement of free speech. The agency was properly dismissed because states are not "persons" within the meaning of section 1983 and so cannot be sued under that section. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65-66 (1989). And because damages suits against state officials in their official capacity are deemed suits against the state, the claims against the defendant officials in their official capacity for declaratory relief were also properly dismissed because the plaintiff's only purpose in seeking such relief in this case was to establish liability for the past infringement of its rights so as to entitle it to damages. *Green v. Mansour*, 474 U.S. 64, 73 (1985). Those officials are also sued in their personal capacity, however, and in that capacity are "persons" within the meaning of section 1983. But the district judge granted summary judgment in their favor; and so the entire suit was dismissed.

The defendants refused to display in the display racks in various buildings in the park a cary two-page pamphlet that the plaintiff had prepared. Entitled "Tips for Avoiding Asbestos Contamination at Illinois Beach State Park," the pamphlet recommends "commonsense approaches . . . for minimizing exposure to you and your family from asbestos contamination while at the beaches of Illinois Beach State Park." It warns that "many pieces of asbestos have been

tumbling along the shoreline for years," that "microscopic asbestos can be released from the sand when agitated," and that "disturbing the sand can cause asbestos to become airborne." And since "asbestos fibers can be found wherever beach sand can go," the reader is advised to "wash your whole body including hair, ears, and under fingernails. Pets should also be washed down prior to leaving the beach . . . . Take care when shaking out towels and blankets that may have come into contact with sand. Remove all beach clothing prior to entering your car or home. Launder beach clothing, blankets, and towels separately. Store shoes and other hard to clean items outside of the home."

The park's numerous display racks contain a variety of brochures and flyers selected by park officials. Some of these are produced by the park itself and are guides to the park or lists of nearby resorts. Some are maps; some, government warnings about pathogens. There are also brochures advertising such draws in the area as an amusement park, a mall, a petting zoo, a store that sells supplies for fishermen, and other sites that might interest tourists.

The beaches do contain asbestos fibers, possibly as a result of the park's adjacency to a site on which Johns-Manville once manufactured building materials containing asbestos; another potential source is beachfront homes that contained asbestos and long ago washed into the lake. But studies of the beaches by federal and state agencies have not found levels of asbestos sufficient to menace human health. U.S. Dept. of Health & Human Services, Agency for Toxic Substances and Disease Registry, "Health Consultation, Exposure Investigation Report on

Illinois Beach State Park" (Oct. 19, 2007), www.atsdr.cdc.gov/HAC/pha/IllinoisBeachStatePark/IllinoisBeachStatePark(EI)HC101907.pdf; Illinois Dept. of Public Health, "Public Health Assessment, Asbestos Contamination at Illinois Beach State Park" (May 23, 2000), www.atsdr.cdc.gov/HAC/pha/illinios beach/ibp_toc.html; see also University of Illinois, Center of Excellence in Environmental Health, "Illinois Beach State Park (IBSP): Determination of Asbestos Contamination in Beach Nourishment Sand" (June 20, 2006), www.uic.edu/sph/glakes/coe/IBSP_Sand_Final _Report1_wo_App.pdf. (All these websites were visited on September 21, 2009.) The park's staff does try, however, to remove from the beaches material that contains or might contain asbestos.

The asbestos at the Illinois Beach State Park has attracted the attention of the media, e.g., Carol Marin & Don Moseley, "It's Not Child's Play; Material Containing Carcinogen Found This Week in Sand Castle at Illinois Beach State Park," *Chicago Sun-Times*, Aug. 2, 2007, p. 3 ("material containing asbestos, a known carcinogen, was found this week wedged in one of the most innocent symbols of summer: a sand castle at the water's edge of Illinois Beach State Park"); Dan Rozek, "More Asbestos Found at Zion Park," *Chicago Sun-Times*, July 2, 2004, p. 21; Dave McKinney, "State Agency Shuts Out Environmental Watchdog at Nature Sanctuary; Dunesland Group Recently Found Asbestos in Preserve," *Chicago Sun-Times*, July 31, 2003, p. 18; Douglas Holt, "State to Investigate Safety at Zion Park; Asbestos Fears Fuel Madigan Action," *Chicago Tribune*, July 3, 2003, p. 1. And until 2004 the racks displayed a "fact sheet," which is in the record, about asbestos in the park that had been prepared by state

environmental and health agencies. But that year the supply of copies of the fact sheet ran out. The defendants say in their brief that they prepared and displayed new fact sheets in 2005 and again in 2006, but these are not in the record and we do not know what their content is or was. The fact sheet that is in the record acknowledged the presence of low levels of asbestos in the park's beaches but denied that they were a health hazard. It is as anodyne as the plaintiff's pamphlet is alarming.

Lawyers in federal appeals invariably frame their arguments in language taken from Supreme Court opinions. In this case, which involves a First Amendment issue, the lawyers have treated us to a barrage of unhelpful First Amendment jargon.

A "forum" in that jargon is a piece of public property usable for expressive activity by members of the public ("private speech," in forum jargon). The Supreme Court distinguishes a "traditional public forum" from a "designated public forum" and both from a "nonpublic forum." E.g., *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009); *Good News Club v. Milford Central School*, 533 U.S. 98, 106-07 (2001); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

A traditional public forum is a street or park, or some other type of public property that like a street or park has long ("time out of mind," as some cases put it, or "from time immemorial," as others say) been used for expressive activity, such as marches and leafletting. A designated public forum, illustrated by a

public theater, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Gilles v. Blanchard*, 477 F.3d 466, 473 (7th Cir. 2007); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 565, 570-71 (9th Cir. 1984), is a facility that the government has created to be, or has subsequently opened for use as, a site for expressive activity by private persons. Usually, as in the case of a public theater, it is available only for specified forms of private expressive activity: plays, in the case of a theater, rather than political speeches. Such limitations are permitted; the public owner of a theater need not throw it open for political rallies even though it is physically capable of being so used. But the owner is not allowed to discriminate among the plays performed in the theater on the basis of the ideas or opinions that the plays express, as appeared to have happened in the *Southeastern Promotions* case.

The third category—the "nonpublic forum" —consists of government-owned facilities like the Justice Department's auditorium that could be and sometimes are used for private expressive activities but are not primarily intended for such use. The government can limit private expression in such a facility to expression that furthers the purpose for which the facility was created. E.g., *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666, 677-80 (1998); *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 804-806 (1985).

Some decisions recognize a fourth category, a variant of the second, variously called a "limited designated public forum" (what Shakespeare's Polonius would have called "a vile phrase"), a "limited public forum," or a "limited forum." *Pleasant Grove*

City v. Summum, *supra*, 129 S. Ct. at 1132; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, *supra*, 460 U.S. at 46 n. 7; *Good News Club v. Milford Central School*, *supra*, 533 U.S. at 106-07; *Gilles v. Blanchard*, *supra*, 477 F.3d 466, 473-74; *Nurre v. Whitehead*, 2009 WL 2857196, at *4 (9th Cir. Sept. 8, 2009); *Steinburg v. Chesterfield County Planning Comm'n*, 527 F.3d 377, 384-85 (4th Cir. 2008); *Bowman v. White*, 444 F.3d 967, 975-76 (8th Cir. 2006); *Husain v. Springer*, 494 F.3d 108, 127-28 (2d Cir. 2007). The terms denote a public facility limited to the discussion of certain subjects or reserved for some types or classes of speaker. In *Gilles* it was an open space in a state university in which members of the university community and their guests—but not uninvited outsiders—were allowed to give talks.

It is difficult to see what difference there is between such restrictions and the selection that the director of a state theater has to make among theater groups clamoring for access to the stage. Indeed it is rather difficult to see what work "forum analysis" in general does. It is obvious both that every public site of private expression has to be regulated to some extent and that the character of permitted regulation will vary with the differences among the different types of site. Street demonstrations have to be regulated to prevent blocking traffic, and the use of a state theater has to be regulated to ration the use of a limited facility and maintain quality, and obviously the regulations will be very different. The constant (applicable even to nonpublic forums, *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, *supra*, 473 U.S. at 800, 806) is that regulation is not to be used as a weapon to stifle speech.

The district judge thought that the display racks in the Illinois Beach State Park are not a public forum but instead are "a mini-library of resources for the public, and [the park's management] necessarily made 'editorial' judgments about which materials to include." Indeed there are cases that say that "forum analysis" does not apply to public libraries. *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion); see also *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 28 (D.C. Cir. 2005); cf. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998); *Arkansas Educational Television Comm'n v. Forbes*, *supra*, 523 U.S. at 672-74. But what is the relevant difference between a state theater (a "designated public forum") and a public library, or the public-college art gallery in *Piarowski v. Illinois Community College Dist. 515*, 759 F.2d 625 (7th Cir. 1985)? In all three cases the management of a government facility has to decide which playwright's or author's or artist's work will be allowed to be exhibited, in view of the site's limited capacity.

The defendants argue that "forum analysis" is inapplicable (more precisely, that it does not support the plaintiff's claim) because the materials in the display racks are "government speech." This term would be readily intelligible if it referred just to situations in which a government official made a statement; he would not be required to contradict himself by including a counterstatement urged by a private person. See *Pleasant Grove City v. Summum*, *supra*, 129 S. Ct. at 1131; *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 833 (1995); *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991); *Keller v. State Bar of California*, 496 U.S. 1, 12-13

(1990); *Choose Life Illinois, Inc. v. White*, 547 F.3d 853, 859 (7th Cir. 2008); *Page v. Lexington County School Dist. One*, 531 F.3d 275, 280-81 (4th Cir. 2008). That would have been the precise situation here had the park display racks still contained the old fact sheet when the plaintiff sought access to the racks for its frightening pamphlet. Most people who read and believed the plaintiff's pamphlet would flee the park forthwith. We don't know what the current fact sheet says, though it must be less alarmist than the plaintiff's, or the park officials wouldn't have excluded the plaintiff's.

But it wouldn't matter if there were no government fact sheet, hence no "government speech" in the literal sense. For there was none in *Summum* either, and it is the leading case on "government speech." A city had accepted a Ten Commandments monument donated to it for display in the city's park and had turned down a monument offered to the city by a Gnostic sect. The Court held that the monument selected by the city was the vehicle of the city's expression, just as playing the national anthem at an official function is government expression even though the anthem was composed by a private person.

The materials chosen for the display racks in the Illinois Beach State Park are designed to attract people to the park, and more broadly to Illinois tourist facilities and services. The choice of materials conveys a message that is contradicted by the plaintiff's pamphlet. The message of the publications in the display racks is: come to the park and have a great time on the sandy beaches. The message of the plaintiff's pamphlet is: you think you're in a nice park but really you're in Chernobyl, so if you're dumb

enough to come here be sure not to step on the sand because that would disturb or agitate it, and to scrub under your fingernails as soon as you get home.

The defendants could avoid giving the appearance of endorsing an opinion that they do not believe by resurrecting their old fact sheet and placing it next to the plaintiff's pamphlet in the display racks. But the mere display of that pamphlet would give it a legitimacy, a weight, that the defendants are not obliged to acknowledge; it would suggest that the park had little confidence in its denial that there was any real asbestos danger. The display rack would soon be crowded with angry pamphlets by environmental activists, and rejoinders by park and other state officials.

Which brings us to the compelling practical objections to the plaintiff's position. Display racks crammed with brochures and pamphlets are omnipresent in public property in the United States, not only parks and other areas of public recreation but also turnpike service plazas and the lobbies of government buildings. If the plaintiff's conception of freedom of speech prevailed, every clerk responsible for stocking such a display rack would face a potential First Amendment suit by an interest group that wanted to influence government action or public opinion. Must every public display rack exhibit on demand pamphlets advocating nudism, warning that the world will end in 2012 (see Lawrence E. Joseph, *Apocalypse 2012: An Investigation into Civilization's End* (2007)), reciting the "Seven Aphorisms of Summum" (the title of the plaintiff's monument in the *Summum* case), or proclaiming the unconstitutionality of the income tax, together with pamphlets expressing

the opposing view on all these subjects? Or (contrary to the recent ruling in *Sutliffe v. Epping School Dist.*, 2009 WL 2973115, at *14 (1st Cir. Sept. 17, 2009)) must the park on request link its online home page to every website of an organization or a person who would like to express an opinion on asbestos fibers or any other topic that might relate to Illinois Beach State Park? We can guess what the effect of the position urged by the plaintiff in this case would be: no more display racks on public property; no more home pages for public agencies. See *Pleasant Grove City v. Summum*, *supra*, 129 S. Ct. at 1138; *Sutliffe v. Epping School District*, *supra*, 2009 WL 2973115, at *17 ("the Town has created a website with the intended purpose to convey information about itself to its citizens and others, and it has added a limited number of hyperlinks to external sites . . . in order to further this purpose. The public forum doctrine could risk flooding the Town website with private links, thus making it impossible for the Town to effectively convey its own message and defeating the very purpose of the website and hyperlinks chosen by the Town"). We can avoid that end by avoiding this beginning.

It is not as if the denial of rack space had closed off the only good avenue that the plaintiff has for reaching the patrons of the state park with its message. At argument the plaintiff's lawyer, repeating an unelaborated statement in his brief, said his client would need a "demonstration permit" in order to be allowed to hand out pamphlets at the entrances to, or sites within, the park, and implied that such a permit might be difficult to obtain. One of the park officials had told him that applying for such a permit "was a potential avenue for the Dunesland Society to access the park in a way that might be able to get their

message out." But he didn't say it was the only way, and the district judge noted that the plaintiff "did not seek to distribute its flyer within the Park by any means other than inclusion in the display racks." The judge added that "no special permit or license is required to hand out pamphlets to Park visitors." The park authorities cannot impose unreasonable barriers to using open public space to convey ideas and opinions (remember that a park is "a traditional public forum"), but there has been no showing that they've tried to do this.

AFFIRMED.

10-14-09

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 06 C 2880

[Filed November 25, 2008]

ILLINOIS DUNESLAND PRESERVATION SOCIETY, an Illinois Corporation

Plaintiff,

v.

THE ILLINOIS DEPARTMENT OF NATURAL RESOURCES, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

In May of 2006, the Illinois Dunesland Preservation Society ("Dunesland") filed a complaint against the Illinois Department of Natural Resources ("IDNR") and a number of individuals, claiming that they violated Dunesland's First and Fourteenth Amendment rights by refusing to display, in display racks located in certain areas of Illinois Beach State Park (the "Park"), an informational pamphlet

Dunesland prepared on how to avoid asbestos exposure at the Park. Plaintiff's four-count complaint seeks a declaratory judgment (Count I); injunctive relief (Counts II and III);[1] and monetary damages pursuant to 42 U.S.C. § 1983 (Count IV).

In August of 2006, Defendants moved to dismiss plaintiff's complaint under Fed. R. Civ. P. 12(b)(6) on the grounds that 1) plaintiff has no First Amendment right to require the IDNR to display Dunesland's pamphlet in the Park's display racks; 2) both IDNR and its agents are immune from § 1983 liability under the doctrine of sovereign immunity; and 3) plaintiff failed to allege that certain of the individual defendants were sufficiently involved in the alleged constitutional violations to support a § 1983 action. I granted defendants' motion in part, dismissing IDNR from the case and dismissing plaintiff's claims for damages and declaratory relief against the individual defendants in their official capacities. I denied the remainder of defendants' 12(b)(6) motion.

Before me now are cross-motions for summary judgment. Plaintiff seeks partial summary judgment on counts II-IV of its complaint, while defendants seek summary judgment on all counts. For the reasons explained below, plaintiff's motion is denied and defendants' motion is granted.

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[1] The same relief--an injunction compelling defendants to display Dunesland's pamphlet--is requested in Counts II and III, but plaintiff asserts the First Amendment in Count II and the Fourteenth Amendment in Count III.

I.

Illinois Beach State Park is the most visited state park in Illinois. It is located in Lake County, bordering Lake Michigan on property owned by the State of Illinois. IDNR is the state agency responsible for operating the Park. At several locations throughout the Park, including locations referred to as the Park Office, the Gate House, the Interpretive Center (or Nature Center), the Marina, and the Lodge, IDNR makes available to visitors a variety of informational materials, which are displayed in and around racks or stands designed for this purpose.[2] These materials typically include visitor guides and maps; pamphlets about other Illinois State Parks; brochures describing local attractions and recreational activities; and health and safety information.

At times relevant to this action, Robert Grosso, who was the Park's Site Superintendent, and Julie Brewer, who worked in the Park Office, were generally responsible for populating the display racks with information they deemed of interest to Park visitors. Some of the information they selected came in the mail from the Illinois Department of Public Health, the Lake County Health Department, and the United States Department of Agriculture. Brewer obtained

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[2] Wall-mounted plastic display racks were used at the Park Office. The manner in which informational materials were displayed evidently varied slightly among the display areas identified in the complaint. These minor differences are immaterial to the resolution of plaintiff's claims, and references in this opinion to "racks" or "display racks" are intended to encompass all such variations.

other literature by visiting sources outside the Park, such as the Lake County Convention Bureau.

IDNR did not have established policies or guidelines for selecting materials to include in Park displays. Grosso and Brewer used their discretion and common sense to select information they thought was appropriate and useful to Park visitors. Brewer testified that Grosso had the "ultimate decision" about which materials were displayed. She further stated that material "about the state park and about the general areas, special events" was generally acceptable, but not "garage sales, personal type things." In August of 2004, the Park displays contained, for example, information relating to: a local amusement park; a nearby shopping center; a Lake County recreation guide; train schedules to Chicago; an Illinois Department of Health pamphlet on E-coli; a Lake County Health Department flyer on Nile Virus; and a United States Department of Agriculture Pest Alert on the Emerald Ash Borer, among other materials.

Dunesland is an Illinois non-profit organization, incorporated in 1950, whose early members were instrumental in establishing the Park. Dunesland has supported and contributed to the Park since its inception, for example by developing educational programs for use at the Park's Interpretive Center and by producing texts describing the flora and fauna found in the Park. Over the years, IDNR has generally included these texts, as well as Dunesland's newsletters and membership applications among the informational materials on display for visitors.

In March of 2000, the Illinois Department of Public Health, the Illinois Environmental Protection Agency, and IDNR jointly developed a fact sheet to communicate information about the presence of asbestos containing material at the Park. From 2000 through some time before August 2004, this fact sheet was displayed at the locations identified in the complaint and at kiosks throughout the Park. At some point, however, the supply of these asbestos fact sheets ran out, and they were no longer displayed at the Park by August of 2004.

Dunesland created its own pamphlet (or flyer) with information on how to avoid asbestos exposure at the Park. On August 31, 2004, Dunesland sent a request to Robert Grosso that "IDNR display the public service flyers relating to asbestos and protecting the health and safety of the public." Specifically, Dunesland sought "to have IDNR display these handout flyers in the same areas where other informational and cautionary flyers and brochures are displayed." Grosso sent a fax to defendants Ascardis, Hickmann, Mayville, and Furr for guidance on Dunesland's request.

Hickmann, Furr, Yonkauski, and Mayville considered Dunesland's request, then instructed Grosso to inform Dunesland that IDNR would not display Dunesland's asbestos pamphlet in the requested display areas. Dunesland did not seek to distribute its flyer within the Park by any means other than inclusion in the display racks. No special permit or license is required to hand out pamphlets to Park visitors.

II.

Summary judgment is proper when the record reflects that there is no genuine dispute as to any material fact, and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp., v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of identifying undisputed facts in the record that it believes demonstrate the absence of a genuine dispute. *Scaife v. Cook County*, 446 F.3d 735, 739 (7th Cir. 2006). If the movant meets this burden, the non-moving party must then go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial." *Id.* (*quoting Vitug v. Multistate Tax Comm'n*, 88 F.3d, 506, 512 (7th Cir. 1996)).

In evaluating the parties' respective positions, I must consider the record as a whole and draw all reasonable inferences in favor of the party opposing summary judgment. *Fisher v. Transco Services-Milwaukee, Inc.*, 979 F.2d 1239, 1242 (7th Cir. 1992). Nevertheless, a mere "scintilla of evidence" favoring the nonmovant is insufficient to defeat summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). If the record "could not lead a rational trier of fact to find for the non-moving party," the non-movant has failed to demonstrate that a genuine factual dispute exists. *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Local Rule ("L.R.") 56.1, which requires certain filings in support of and in opposition to summary judgment motions, was adopted to assist district courts in sorting out which facts, if any, are genuinely in dispute. *Portis v. City of Chicago*, 510 F.Supp. 461, 463

(N.D. Ill., 2008). Specifically, L.R. 56.1(a)(3) requires that the moving party provide a statement of material facts that it contends are undisputed and entitle it to judgment in its favor. *Id.* The opposing party must provide a concise response admitting or denying each of the movant's statements, and in the case of any disagreement, must cite to specific facts in the record that it contends demonstrate a genuine dispute. *Id.*; L.R. 56.1(b)(3). The non-movant may also include a statement of additional facts and supporting citations, in separate numbered paragraphs, that it contends defeat summary judgment. *Portis,* at 463; L.R. 56.1(b)(3).

Plaintiff's L.R. 56.1 submissions defy both the letter and the spirit of the Rule. In 334 statements of fact (many of which contain multiple assertions and/or state facts with no apparent relevance to the issues presented), and eighty-two pages of meandering and argumentative responses to defendants' nine page submission, plaintiff effectively obfuscates, rather than clarifies, any genuine factual disputes.

I am entitled to demand strict adherence to L.R. 56.1, and I may refuse to consider assertions presented in a manner that does not comport with the rule. *Ciomber v. Cooperative Plus, Inc.*, 527 F.3d 635, 643 (7th Cir. 2008). Indeed, I may deem admitted any fact not properly disputed in the manner provided by the Rule. *Tulley v. Tharaldson Enterprises, Inc.*, No. 99 C 50238, 2001 WL 1002406, at *1 (N.D. Ill. 2001 August 29, 2001)(*citing Jupiter Aluminum Corp. v. Home Ins. Co.*, 225 F.3d 868, 871 (7th Cir. 2000)). Nevertheless, it is apparent from my review of the parties' briefs and authorities cited that resolution of these cross-motions rests upon legal questions that can be resolved with

reference to relatively few facts.[3] Accordingly, I have considered plaintiff's L.R. 56.1 submissions, regardless of their impropriety, to the extent necessary for an understanding of the narrow factual landscape. The narrative in the previous section reflects the material facts as to which I find there is no genuine dispute.

III.

Plaintiff does not dispute that if the literature displayed in the Park display racks constitutes government speech, it has no right to have its flyer in the displays. "It is well established that when the government speaks, 'it is entitled to say what it wishes.'" *Choose Life Illinois, Inc., v. White*,---F.3d---, 2008 WL 4821759, at *5 (7th Cir. 2008)(*quoting Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) and *citing cases*). Indeed, if the messages conveyed in the display racks are the government's own, no private speech rights are implicated by its choice of content. *Choose Life*, at *5. To prevail at summary judgment based on the theory that the display racks constitute government speech, defendants must first establish facts that support that legal conclusion. Even if they meet this initial burden, however, they are entitled to summary judgment only if plaintiff cannot either controvert defendants' facts with specific evidence in the record, or establish additional facts to support a contrary legal conclusion.

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[3] Because the same factual and legal issues govern the parties' cross-motions, and because the movant bears a higher burden than the non-movant on summary judgment, I focus my discussion on the grounds for granting defendants' motion. Largely the same analysis explains, *a fortiori*, the basis on which I deny plaintiff's motion.

Defendants also argue that the Supreme Court's "speech forum" doctrine is inapplicable to this case regardless of whether the display racks are purely government speech. To prevail based on this theory, defendants must establish (again based on uncontroverted facts) that the IDNR's exercise of discretion in deciding what private speech to make available in the Park's display racks is inappropriate for analysis based on public forum principles. *See U.S. v. American Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003). Assuming defendants meet this burden, plaintiffs may still survive summary judgment by controverting defendants' factual assertions with specific record evidence, or by identifying additional facts that support the application of the speech forum doctrine. As to the latter burden, plaintiff must present sufficient evidence from which to conclude that the display racks are either a "traditional" or a "designated" public forum, or that they are a nonpublic forum from which plaintiff was unreasonably excluded.[4] *See Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985).

The exact contours of the "government speech" doctrine are a bit nebulous and appear to be in a state of flux at present. *See Pleasant Grove City, Utah v. Summum*, 128 S.Ct. 1737 (2008) (granting writ of

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[4] Although defendants contend that speech forum principles are inapplicable, they argue in the alternative that these principles support a judgment in their favor. Because I agree that speech forum principles are inapplicable, I need not discuss defendants' alternative argument at length.

certiorari).[5] For example, the Court of Appeals for the District of Columbia noted, in *People for the Ethical Treatment of Animals v. Gittens*, 414 F.3d 23, 28 (D.C.Cir. 2005)("*PETA*"), that a compilation of third-party speech is itself a "communicative act" (*citing Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674), then held that such an act by the government, at least in the context of public libraries and government-sponsored art exhibits, constitutes government speech. ("Those who check out a Tolstoy or Dickens novel would not suppose that they will be reading a government message. But in the case of a public library, as in the case of the Party Animals exhibit, there is still government speech.") Yet, most of the cases on which the *PETA* court relied held the forum analysis inapplicable *without* explicit reference to the government speech doctrine.

In the context of this case, I find it unnecessary (as well as imprudent, in light of the pending *Pleasant Grove* case), to decide whether the "compilation of the speech of third parties" in the display racks amounts to purely government speech. Instead, I rely on the analyses discussed in *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802)(describing types of forums), and *U.S. v. American Library Ass'n* 539 U.S. 194, 206 (2003)(holding forum analysis inapplicable to public libraries' provision of

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[5] One of the issues the Supreme Court has been asked to decide in *Pleasant Grove* is whether a "compendium of private speech" displayed on government property constitutes government speech. Though monuments--not flyers--are at issue in *Pleasant Grove*, it is possible that the Court's analysis will affect whether the contents of the display racks in this case can be considered government speech.

Internet services), and conclude that forum analysis is inapplicable to the Park's display racks.

In *Cornelius*, the Court explained that a forum is defined with reference to the access sought by the speaker. *Cornelius*, at 801. The *Cornelius* court held that "the government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." *Cornelius*, at 802. The Court continued, "not every instrumentality used for communication...is a traditional public forum or a public forum by designation." *Id.*, at 803.

In *American Library Association*, the Court revisited these principles in upholding the constitutionality of a statute that requires public libraries to use Internet filters as a condition to receiving federal subsidies. Speaking for a plurality of the Court, Chief Justice Rehnquist explained,

> A public library does not acquire Internet terminals in order to create a public forum for web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to "encourage a diversity of views from private speakers," but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.

American Library Ass'n, Inc., at 206 (plurality opinion) (*distinguishing Rosenberger*, 515 U.S. at 834). Likening public libraries to public broadcasters, as in *Forbes*, and to funders of the arts, as in *National*

Endowment for Arts v. Finley, 524 U.S. 569, 585-586 (1998), the plurality concluded that forum analysis was incompatible with the libraries' fundamental mission of "furnishing materials of requisite and appropriate quality" to the public, which required them to exercise broad discretion. 539 U.S. at 206.

In this case, the uncontested facts establish, first, that plaintiff sought only to display its flyers in the display racks, not to hand them out or otherwise to distribute them anywhere within the Park. Accordingly, my inquiry is whether forum analysis is applicable to the display racks specifically, not to the Park generally.[6] See Cornelius, at 801. I conclude based on *Cornelius* and *American Library Association* that it is not.

The parties agree that IDNR lacked a formal policy or guidelines for determining which materials would be included in the display racks.[7] The display racks

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[6] The Park is unquestionably a "traditional" public forum, *Hague v. Committee for Indus. Organization*, 307 U.S. 496, 515 (1939), while the display racks, just as unquestionably, are not. Park display racks are not among the places that have "immemorially been held in trust for the use of the public and, time out of mind...used for purposes of assembly, communication of thoughts between citizens, and discussing public questions." *Id.* And, as the Supreme Court has cautioned, "the doctrines surrounding traditional public forums may not be extended to situations where such history is lacking." *American Library Ass'n*, at 206.

[7] Presumably to buoy their argument that the display racks are government speech, defendants deny several of plaintiff's factual statements on this issue on the ground that they are not supported by the citations. *See, e.g.*, Docket No. 165, answers to ¶¶ 105-106, 110. These denials are disingenuous; the assertions

contained a combination of solicited and unsolicited materials, and the primary selection criteria were whether the information would "assist visitors and give them information about other ways to spend their time in the area," would not be "inconsistent with any other message [IDNR] was trying to express," and, in the case of public health advisories, would provide information visitors "would need to know about."

These facts demonstrate that IDNR's intent in creating and maintaining the display racks was not to "create a public forum for [private speakers] to express themselves," *American Library Ass'n*, at 206, but rather to facilitate the recreational pursuits of visitors to the park. *Id*. Creating an "instrumentality used for communication" is not tantamount to opening a public forum. *Cornelius*, 473 U.S. at 803.

Plaintiff has not identified any evidence from which to conclude that IDNR affirmatively decided to use the display racks as a forum for public debate or discourse. Rather, uncontroverted evidence shows that the IDNR intended to designate certain well trafficked areas of Park property as centers for providing useful information to Park visitors.[8] In essence, IDNR created

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are clearly supported by the record, sometimes restating witness testimony verbatim. Moreover, defendants' citations do not controvert plaintiff's on this issue. Nevertheless, under my analysis, these citations ultimately support defendants' case, not plaintiff's because "the government does not create a public forum by inaction." *Cornelius*, at 802.

[8] Plaintiff is correct that the inquiry into intent "is not merely a matter of deference to a stated purpose." *Air Line Pilots Ass'n Intern. v. Department of Aviation of the City of Chicago*, 45 F.3d

a minilibrary of resources for the public, and it necessarily made "editorial" judgments about which materials to include. As the *American Library Association* plurality concluded, "public forum principles...are out of place" in this type of context. 539 U.S. at 205. IDNR had broad discretion to select materials that would "facilitate...recreational pursuits by furnishing materials of requisite and appropriate quality." *Id.* at 206. That is what the record shows it

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1144, (7th Cir. 1995). Plaintiff relies heavily on *Air Line Pilots*, emphasizing the Seventh Circuit's requirement that two factors be considered to ascertain intent: 1) the government's policy and practice, and 2) the nature of the property and its compatibility with expressive activity. *Id.*, *citing Cornelius*, 473 U.S. at 802-03. Consideration of these factors does not save plaintiff from summary judgment in this case. Although IDPH lacked formal policies governing the selection of material for display, it is undisputed that in practice, Brewer and/or Grosso excluded materials they considered inappropriate. This distinguishes the instant case from *Planned Parenthood Ass'n v. Chicago Transit Authority*, 767 F.2d 1225 (7th Cir. 1985), in which the government had a general policy of open access for "almost anyone willing to pay," as explained by the *Air Line Pilots* court. 45 F.3d at 1153. Nor is the nature of the displays compatible with unbridled access for any and all expressive activity; surely visitors cannot be expected to forage through an infinite range of literature in hopes of finding, for example, a map of the Park. Plaintiff's reliance on *Air Line Pilots* is unavailing for the additional reason that the judgment in that case reversed a motion to dismiss, not a motion for summary judgment. The Seventh Circuit has often described summary judgment as the "put up or shut up moment in a lawsuit," *see, e.g., Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008), and plaintiff has offered no meaningful evidence to suggest that the government's policy was anything other than the one asserted: to assist Park visitors by providing useful information.

did, and plaintiff has no First Amendment right to injunctive relief.[9]

In the absence of a First Amendment right to display its flyer in the racks, plaintiff's Fourteenth Amendment claim founders. As plaintiff acknowledges, where no interference with fundamental rights is at issue, a challenged government action need only survive "rational-basis scrutiny." *Vision Church v. Village of Long Grove*, 468 F.3d 975, 1001 (*quoting Locke v. Davey*, 540 U.S. 712, 721 n. 3 (2004)). Under this standard, plaintiff must demonstrate "malicious conduct" on the part of government officials that is unrelated to any legitimate state objective. *Vision Church*, at 1001. Plaintiff falls far short of the mark. In fact, other than the conclusory statements that IDNR's actions "cannot withstand either level of scrutiny" and that no legitimate state interest is at issue, plaintiff makes no serious argument that

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[9] My factual finding that the government did not intend to designate a public forum means that even if public forum principles applied, the display racks could only be considered a nonpublic forum. In nonpublic forums, restrictions on speech need only be reasonable and may not discriminate on the basis of viewpoint. *Air Line Pilots*, 45 F.3d at 1151 (*citing Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)). Even assuming that the exclusion of plaintiff's flyer was viewpoint based (though this is far from clear), I find that because 1) Dunesland was not prohibited from distributing its flyer within the Park by means other than inclusion in the displays, and 2) the IDNR has a legitimate interest in limiting the materials in the displays to those it considers appropriate and useful to visitors, any restriction on plaintiff's expressive activities was consistent with the First Amendment. *See Cornelius*, 473 U.S. 788 at 809 (restriction on access to nonpublic forum need not be narrowly tailored, nor must government interest be compelling).

IDNR's refusal to display Dunesland's flyer reflects an irrational or malicious intent.

Of course, with the fall of plaintiff's constitutional claims comes the demise of its § 1983 claim, as liability under § 1983 is premised upon a constitutional violation.

IV.

For the foregoing reasons, Dunesland's motion for partial summary judgment is denied and defendants' motion for summary judgment is granted.

ENTER ORDER:

/s/Elaine E. Bucklo
Elaine E. Bucklo
United States District Judge

Dated: November 25, 2008

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 06 C 2880

[Filed November 25, 2008]

Illinois Dunesland	)
	)
v.	)
	)
The Illinois Department of Natural	)
	)

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Dunesland's motion for partial summary judgment is denied and defendants' motion for summary judgment is granted. The case is therefore terminated.

Michael W. Dobbins, Clerk of Court

Date: 11/25/2008

/s/ Mathew P. John, Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 09-1535

[Filed November 10, 2009]

ILLINOIS DUNESLAND PRESERVATION SOCIETY,
Plaintiff-Appellant,

v.

ILLINOIS DEPARTMENT OF NATURAL RESOURCES, *et al.*,
Defendants-Appellees.

Before
FRANK H. EASTERBROOK, *Chief Judge*
RICHARD A. POSNER, *Circuit Judge*
DIANE P. WOOD, *Circuit Judge*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 06 C 2880

Elaine E. Bucklo, *Judge*.

ORDER

On October 28, 2009, plaintiff-appellant filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

APPENDIX D

STEPS TO MINIMIZE ASBESTOS EXPOSURE AT THE BEACH

1. ***Avoid Eating, Drinking and Smoking While on the Beach!***
   Asbestos fibers can contaminate your hands, food, and containers. Eat in picnic areas away from the beach. According to the USEPA, cigarette smoking greatly increases the likelihood of a person developing lung cancer as the result of asbestos exposure.

2. ***Avoid Touching Rocks on the Beach!***
   Many pieces of asbestos have been tumbling along the shoreline for years. These worn asbestos pieces have the visual appearance of shoreline rocks but contain asbestos fibers. The Park has placed signs on the beach that warn the public to avoid handling asbestos and to contact the park office if asbestos is discovered. The USEPA has the following recommendation for homeowners who may have found similar asbestos materials at their homes: "Don't touch it, but look for signs of wear or damage such as tears, abrasions, or water damage. Damaged material may release asbestos fibers. This is particularly true if you often disturb it by hitting, rubbing, or handling it, or if it is exposed to extreme vibration or air flow."

3. ***Avoid Disturbing the Sand*** !
Microscopic asbestos can be released from the sand when agitated. Disturbing the sand can cause asbestos to become airborne. According to the USEPA, "Sometimes the best way to deal with slightly damaged material is to limit access to the area and not touch or disturb it." The Illinois Department of Public Health states "... removal of sand and other materials by the public should be prohibited."

4. ***Shower Off and Clean Belongings Prior to Leaving the Beach!***
The asbestos fibers can be found wherever beach sand can go. Wash your whole body including hair, ears, and under fingernails. Pets should also be washed down prior to leaving the beach.

5. ***Carefully Clean or Isolate Clothing, Shoes, Blankets, Towels, Coolers and Other Items Used at the Beach!***
"Don't track material that could contain asbestos through the house." (USEPA) Take care when shaking out towels and blankets that may have come into contact with sand. Remove all beach clothing prior to entering your car or home. Launder beach clothing, blankets, and towels separately. Store shoes and other hard to clean items outside of the home.

6. ***Avoid Certain Cleaning Methods!***
Do not dust, sweep, or vacuum debris that may contain asbestos. According to the USEPA, "These steps will disturb tiny

asbestos fibers and may release them into the air." The use of High Efficiency Particulate Air (HEPA) filtered vacuums is recommended for cleaning up dust and fibers. Asbestos fibers can penetrate the filter of a regular vacuum cleaner causing the fibers to become airborne.

Copyright: Illinois Dunesland Preservation Society, 2004

WHY IS ASBESTOS ON A PUBLIC BEACH?

Illinois Beach State Park has a long history of asbestos contamination. There is a federal asbestos Superfund clean-up site on the Johns-Manville property adjacent to the south end of the park's Nature Preserve. This Superfund site contains one million tons of asbestos waste. A discharge pipe from this Superfund site empties into Lake Michigan and periodically spews as much as 22 million microscopic asbestos fibers per liter of water into Lake Michigan, some of which washes up on the park's beaches. (Documented by the USEPA in May, 2002.) The Johns-Manville lagoon system leaks asbestos and other contaminants into the Nature Preserve where it flows into the Dead River which empties into the federal and state navigable waters of Lake Michigan. The Greenwood Avenue fishing pier has been closed for over a year due to extensive asbestos contamination.

Old homes at the northern end of the park were demolished and some of the debris was buried. Erosion of the shoreline and the lake bottom,

along with the construction of the North Point Marina, have now exposed this debris which may include ACM (asbestos-containing materials) and washes onto the beach.

Authorized by the Illinois Department of Natural Resources and the IEPA, dredging operations offshore of Midwest Generation (ComEd) and adjacent to Johns-Manville have transported this contaminated, dredged material by barge or truck north to the park and have deposited it on the park's beaches for beach "nourishment" to offset erosion. The Army Corps of Engineers has also dumped dredged material contaminated with asbestos (and other contaminants) which was taken from the Waukegan Harbor approach channel and deposited on the Park's beaches. The original source for most of the asbestos contamination (microscopic and pieces) appears to be from the Johns-Manville Superfund site.

Visible asbestos continues to appear on the public beaches even though several tons of asbestos have been removed over the last 6 years. The Illinois Department of Public Health stated on August 1, 2003, "*Occasional handling of ACM may occur by children collecting shells, rocks and other materials along the beaches or by adults who remove sand for gardening or construction purposes.*"

The Illinois Department of Natural Resources' asbestos consultant describes the asbestos found on the beach as "commonly discovered during weekly surveys." (Report dated 7/12/04.) More recently, "friable" (damaged pieces where fibers

can easily become airborne) asbestos was discovered. (Report dated 8/17/04.) No efforts have been made during this time to clean up the cancer and disease- causing microscopic asbestos on the beach.

The inside of this pamphlet contains practical actions families can take to minimize asbestos exposure while at the beach. Other recommendations provided by the U.S. Environmental Protection Agency, Illinois EPA, the federal Centers for Disease Control and Illinois Department of Public Health will help families learn how to protect themselves and prevent potential microscopic asbestos contamination from affecting their families, pets, vehicles, and homes.

TIPS FOR AVOIDING ASBESTOS CONTAMINATION AT ILLINOIS BEACH STATE PARK

A safe level of asbestos exposure has yet to be established by the government. However, it is impossible to avoid breathing any asbestos fibers. The Illinois Department of Public Health made the following statement regarding visible asbestos found by the public at Illinois Beach State Park on August 1, 2003:

"To reduce exposure to the public, warning signs about the possible presence of ACM (asbestos-containing material) should be clearly posted, children should be actively discouraged from collecting ACM from beaches, and removal of sand and other materials by the public should be prohibited."

As a precaution, we are recommending the commonsense approaches on the inside for minimizing exposure to you and your family from asbestos contamination while at the beaches of Illinois Beach State Park.

Provided as a Public Service by
Illinois Dunesland Preservation Society

The society is a not-for-profit environmental organization that helped found the park over fifty years ago. It was the first nature preserve in the United States. Our goal is to preserve the environment at the state park and the surrounding areas. The society also helped found the Illinois Nature Preserve Commission. For volunteer and membership information or to make a donation, please contact:
P.O. Box 466, Zion, IL 60099
Phone Number: 312 332-3377
FAX Number: 312 332-3379

Asbestos References

USEPA: **http://www.epa.gov/opt/asbestos/ashome.html**
CDC: **http://www.atsdr.cdc.gov/asbestos/asbestos effects.html**